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IN THE

reme Court of the United States.

OCTOBER TERM, A. D. 1897.

No. 116.

The Hartford Fire Insurance Company et al.,
Plaintiffs in Error,

vs.

icago, Milwaukee & St. Paul Railway Company,
Defendant in Error.

RIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

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STATEMENT OF THE CASE.

This cause has been brought into this court by writ of *certiorari* to the Circuit Court of Appeals for the Eighth circuit.

The facts as disclosed by the record are as follows:

February 1, 1890, Simpson, McIntire & Co. leased from the defendant railway company, for a term of one year, a portion of its station grounds at Monticello, Iowa, for the purpose of erecting and maintaining thereon a cold-storage warehouse in close proximity to the railroad tracks. The money rental was but $5 a year, but the lease contained a provision—out of which this litigation arises—as follows:

"Upon the express condition that the said railway company, its successors and assigns, shall be exempt and released, and said parties of the second part, for themselves and for their heirs, executors, administrators and assigns, do hereby expressly release them from all liability or damage by reason of any injury to, or destruction of, any building or buildings now on, or which may hereafter be placed on, said premises, or of the fixtures, appurtenances or other personal property remaining inside or outside of said buildings, by fire occasioned or originated by sparks or burning coal from the locomotives, or from any damage done by trains or cars running off the track, or from the carelessness or negligence of employes or agents of said railway company." (Rec., 14.)

Under the terms of this lease, Simpson, McIntire & Co., entered upon the demised premises and erected thereon a cold-storage warehouse. After the expiration of the year they continued in possession under the terms and conditions of the original lease until November 11, 1892, when the building and contents were destroyed by fire. At the time of the fire, Simpson, McIntire & Co. held insurance policies in the plaintiff companies upon the warehouse and its contents, upon which policies of insurance the plaintiff companies paid to Simpson, McIntire & Co. the aggregate sum of $23,450. Having paid this amount, and considering that they had thereby become subrogated *pro tanto* to the rights of the insured, they brought this suit in May, 1893, against the defendant railway company, to recover the amount so paid, alleging that the fire was occasioned by the negligence of the defendant company in the operation of its trains.

The suit was begun in the District Court of Jones County, and removed by the defendant to the Circuit Court of the United States for the Northern district of Iowa.

In defense of the action, the defendant railway company pleaded its exemption from liability under and by virtue of the above quoted clause in the lease. Plaintiffs demurred upon the ground that the exemption from liability for negligence contained in the lease was contrary to public policy and void.

At the argument it appeared that the Supreme Court of Iowa in the case of *Griswold* v. *Illinois Central Railroad Company*, 90 Iowa, 265, had, in 1892, held in an opinion never officially reported that a similar exemption in a lease made by a railroad company was opposed to public policy and void, but upon rehearing, had reached an opposite conclusion, and had finally held, in 1894, that such exemption was not contrary to the public policy of the State of Iowa, but was lawful and would be enforced by the courts of that state. It also reaffirmed its decision by denying a second rehearing.

Griswold v. *Illinois Central R. R. Co.*,
90 Iowa, 265.

At the Circuit, the case was argued before SHIRAS, J., who without expressing an opinion upon the question considered as an original one, held that he was bound to follow the decision of the Supreme Court of the state upon a question of public policy of the state. (Rec., 19.)

The court thereupon overruled the demurrer, and plaintiffs electing to stand thereon, judgment was rendered for the defendant with costs. Plaintiffs sued out a writ of error to the Court of Appeals of the Eighth Circuit, and upon argument before that court, SANBORN, J., announced the decision of the court in an opinion affirming the judgment below, upon the broad ground that the exemption in question was not

contrary to public policy as a matter of general law, but was valid and enforceable.

A writ of certiorari was issued by this court, and the case stands for argument upon the sole question of the validity of the exemption from liability contained in the lease.

BRIEF AND ARGUMENT.

We submit two propositions:

(1.) The decision of the court of last resort of any state as to the public policy of that state, is conclusive and binding upon all other courts, state and federal.

(2.) Even if the Supreme Court of Iowa had not passed upon the question, the Circuit Court of Appeals was clearly right in deciding, as a general proposition, that the exemption contained in the lease is not contrary to public policy and is, therefore, valid.

I.

Inasmuch as the provision of the contract exempting the defendant company from liability for negligence is attacked on the ground that it is against public policy, it is proper that we should first inquire what is the meaning of the term "public policy"? It is constantly found in the law books and judicial decisions, and has been frequently defined, although it has not received that exact and precise definition which might be given if there were some fixed and unalterable standard by which it could be determined. It varies in different states and

countries, and even in localities of the same state or country. It changes with the advance of civilization, with variations in climate, with physicial and political conditions, and even with the growth of states. As was said in *Davis* v. *Davis*, 36 L. R. Chancery Div., 359:

> "One thing I take to be clear, and that is this: that public policy is a variable quantity; that it must vary, and does vary, with the habits, capacities and opportunities of the public."

This court by BROWN, J., in *Pope Manufacturing Co.* v. *Gormully*, 144 U. S., 233, used this language:

> "The standard of such policy is not absolutely invariable or fixed, since contracts which at one stage of our civilization may seem to conflict with public interests, at a more advanced stage are treated as legal and binding."

Starting then, with the admitted premise that public policy is in its nature variable, let us inquire what the term means; what relation it bears to the affairs and dealings of men with each other? It may be comprehensively stated that the public policy of a state means the local self-interest of that commonwealth. It looks to the public good, and does not permit the people of that state or country to enforce contract obligations which are injurious to the public. The Supreme Court of Illinois, in *People* v. *Gas Trust*, 130 Ill., 294, stated the doctrine thus:

> "Public policy is that principle of the law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against the public good."

Accepting as a sound statement of the doctrine of public policy that it forbids agreements between private individuals which have a tendency to injure the public, we immediately encounter the difficulty of determining what

is and what is not injurious to the public welfare. Obviously on such a question, minds will differ. The political, economic and ethical views of different individuals will lead them to different conclusions as to what is detrimental to the general welfare. We must, therefore, find some acknowledged standard by which courts can act in determining so difficult a question. That standard is found, and only found, in the constitutions, laws and judicial decisions of the state or the country in which the question arises.

STATE PUBLIC POLICY AND NATIONAL PUBLIC POLICY. There is a public policy of the state and a public policy of the Nation, because each, within the limits of its own sovereignty is supreme, and each may determine for itself what is or is not against the public good.

SHIRAS, J., at the Circuit, very clearly pointed out, in this case, the distinction between state public policy and national public policy. He says:

> "The subject matter of the contract may be such that it affects the country at large, or it may be local in its nature. The nature of the subject matter determines the source from which light must be sought upon the question of fact whether the provisions of a given contract are or are not contrary to public policy. In other words, there is a public policy of the nation, applicable to all matters wherein the people at large are interested, including those committed to the control of the national government, and coextensive with the boundaries of the union, and also a state public policy adapted to the circumstances of the locality embraced within the boundaries of the state, and applicable to all matters within state control." (Rec., p. 21) 62 Fed. Rep., 906.

Immediately following the language we have quoted above, Judge SHIRAS points out how the public policy of

the state and how the public policy of the nation are to be ascertained. He says:

> "In seeking to ascertain the requirements of the public policy of the nation, the principal sources of information are the constitution of the United States, the statutes enacted by Congress, and the decisions of the courts, federal and state; and in case there should be a divergence in the views of the federal and state courts upon a question of national public policy, the conclusion reached in the Federal courts must be accepted as the best evidence of what the requirements of the national public policy are. On the other hand, when seeking to determine the public policy of the state towards a subject within state control, the principal sources of information are the state constitution and statutes, and the decisions of the courts, state and federal; and, in case of a divergence between them, the decisions of the state court must be accepted as the best evidence of the public policy of the state. *Vidal* v. *Girard's Ex'rs.*, 2 How., 127-197; *Swann* v. *Swann*, 21 Fed., 299." (Rec., p. 21.) 62 Fed. Rep., 906.

We are thus brought to the question whether the public policy which has been invoked by plaintiffs in error against the exemption from liability found in the terms of the contract, is the public policy of the State of Iowa or the public policy of the United States. If we are to look to the public policy of Iowa for a determination as to the validity of the contract, we shall discover that public policy in the decisions of its Supreme Court; there we shall find the authoritative announcement of what is good and what is bad for the common weal. It is a great responsibility; but it is wisely placed upon the court whose decision is last, and to which all must look for guidance. The courts of another sovereignty might possibly decide more wisely what is best for the public welfare of Iowa than her own courts, but each

state must determine for itself what its public policy shall be, what rules of conduct and morals are best for the well-being of its inhabitants. The decisions of a court of last resort in a state are as conclusive in determining the law of the state—that is to say the public policy of the state which *is* law—as are the constitution and statutes of the state. Written laws declare the policy of a state, but when legislatures are silent, the court of last resort is the sovereign voice in which laws and policies find final expression. All courts recognize this doctrine, and the Federal courts from an early time have sanctioned and enforced it. They have uniformly refused to assume the power of making or controling local policy, but have been content to ascertain and follow it as announced by the decisions of the highest court of the state.

As far back as 1839, in the leading case of *Bank of Augusta* v. *Earle*, 13 Peters, 519, this court, in considering the power of corporations created by one state, to make contracts and do business in another state, said, by TANEY, C. J.:

"The state has not made known its policy upon any of these points. And how can this court, with no other lights before it, undertake to mark out by a definite and distinct line the policy which Alabama has adopted in relation to this complex and intricate question of political economy? * * * How can this court, with no other aid than her general principles, asserted in her constitution, and her investments in the stocks of her own banks, undertake to carry out the policy of the state upon such a subject in all of its details, and decide how far it extends, and what qualifications and limitations are imposed upon it? These questions must be determined by the state itself, and not by the courts of the United States. Every sovereignty would, without doubt, choose to designate its own line of policy; and would never consent to leave it as a problem to be worked out by the courts of

the United States from a few general principles, which might very naturally be misunderstood or misapplied by the court. It would hardly be respectful to a state for this court to forestall its decisions, and to say, in advance of her legislation, what her interest or policy demands. Such a course would savor more of legislation than of judicial interpretation." (p. 594.) * * * "*When a court is called on to declare contracts thus made, to be void upon the ground that they conflict with the policy of the state, the line of that policy should be very clear and distinct, to justify the court in sustaining the defense.*" (p. 597.)

So, also, in *Vidal* v. *Girard's Executors*, 2 Howard, 127, this court, in sustaining a devise of Stephen Girard to the City of Philadelphia for the establishment of a college for poor boys, upon certain principles therein prescribed, say, STORY, J.:

"The objection is that the foundation of the college upon the principles and exclusions prescribed by the testator, is derogatory and hostile to the christian religion, and so is void as being against the common law and public policy of Pennsylvania. * * * In considering this objection, the court are not at liberty to travel out of the record in order to ascertain what were the private religious opinions of the testator (of which, indeed, we can know nothing), nor to consider whether the scheme of education by him prescribed is such as we ourselves should approve, or as is best adapted to accomplish the great aims and ends of education. Nor are we at liberty to look at general considerations of the supposed public interest and policy of Pennsylvania upon this subject, beyond what its constitution and laws and judicial decisions make known to us. The question, what is the public policy of a state and what is contrary to it, if inquired into beyond these limits, will be found to be one of great vagueness and uncertainty, and to involve discussions which scarcely come within the range of judicial duty and functions, and upon which men may and will complexionally differ. Above all, when that topic is connected with religious polity, in a country

composed of such a variety of religious sects as our country, it is impossible not to feel that it would be attended with almost insuperable difficulties, and involve differences of opinion almost endless in their variety. *We disclaim any right to enter upon such examinations, beyond what the state constitutions, and laws and decisions necessarily bring before us.*" (Page 197-8.)

In *Teal* v. *Walker*, 111 U. S., 242, this court, by WOODS, J., used the following language:

"That contract was contrary to the public policy of the State of Oregon, as expressed in the statute just cited, and was not binding on the mortgagor or his vendee, *and although not expressly prohibited by law, yet, like all contracts opposed to the public policy of the state, it cannot be enforced.*" (P. 252.)

This doctrine is perfectly familiar and one might almost say that an apology is due to the court for quoting from its own decisions to enforce it. Nowhere has it been more emphatically stated than in *City of Detroit* v. *Osborne*, 135 U. S., 492, by BREWER, J. He says:

"But, even if it were a fact that the universal voice of the other authorities were against the doctrine announced by the Supreme Court of Michigan, the fact remains that the decision of that court, undisturbed by legislative action, is the law of that state. Whatever our views may be as to the reasoning and conclusion of that court is immaterial. It does not change the fact that its decision is the law of the State of Michigan, binding upon all its courts and all of its citizens, and all others who may come within the limits of the state. The question presented by it is not one of general commercial law. It is purely local in its significance and extent. It involves simply a consideration of the powers and liabilities granted and imposed by legislative action upon cities within the state. While this court has been strenuous to uphold the supremacy of federal law and the interpretation placed upon it by the Federal courts, *it has been equally strenuous to uphold the decisions by state courts of questions of purely local law. There should be in all*

matters of a local nature, but one law within the state, and that law is not what this court might determine, but what the Supreme Court of the state has determined."

In the above language this court has disclaimed any right or authority to decide questions of state public policy. It followed the decision of the Supreme Court of Michigan, and held that the decision of that court upon a question of the public policy of that state, was conclusive upon this court.

We pass from this branch of the discussion, for there is little in it to discuss. The law is acknowledged and settled by repeated decisions, that this court and all Federal courts will follow the decisions of the court of last resort of any state upon questions of the constitution, laws and public policy of that state.

THE QUESTION OF PUBLIC POLICY INVOLVED IN THIS CASE IS PURELY LOCAL TO THE STATE OF IOWA. We have shown that on questions of state public policy, the decisions of the Supreme Court of the state are conclusive.

The Supreme Court of Iowa having passed upon this question—having determined the public policy of that state in respect to such a contract as this—the only escape from the effect of the decision of that court is to assert that the question is not one of state public policy, but of national public policy, or of some general policy which is neither state or national.

That the contract and all of its provisions were entirely within the cognizance of the laws of Iowa is perfectly plain. All of its provisions might have been the subject of state legislation, The state might, by statute, have authorized or forbidden such exemptions as the one contained in this lease, and would anybody claim that

such legislation is beyond the competency of the state to enact? Suppose, for instance, the legislature of Iowa had passed a statute containing this provision: "No contract containing an exemption from liability for negligence shall be valid in this state:" Would anyone claim for a moment that such a statute was not within the power of the state? There is not a statute book of any state in the Union which does not contain numerous provisions fixing liability for negligence and regulating that subject as one of local concern. The contract in question was one establishing the relation of landlord and tenant. It vested in the lessees an estate or interest in lands; it gave to the tenant certain rights of user and enjoyment and it reserved to the landlord, as a condition of the lease, an exemption from liability for negligence. All of its terms and covenants were to be performed in Iowa, and it is impossible to conceive of a contract more purely local in its character than this. All the rights which the lessor company had in the demised property; all the rights it enjoyed in the operation of its railway; all the powers of contract which belonged to it came from the State of Iowa. The sole power to hold and enjoy its right of way was derived from the state. The state, therefore, could impose the terms upon which it should be held and enjoyed. It could define and fix all the liabilities and immunities of the railway company in respect to it. The state might have positively forbidden the railway company to demise any portion of its right of way; but it did not do so, and the railway company, having the acknowledged right to demise the premises in controversy in this case, could impose as a condition of the lease, any terms not forbidden by the statutes or the policy of the state, as an-

nounced by its courts. Numerous statute laws have declared what shall be the rights, the obligations and the liabilities of railway companies in Iowa. No one doubts that the state might have gone farther and enacted that if the defendant company should lease any of its property, it should not reserve an exemption from liability for negligence; but the state in its wisdom refrained from enacting any such statute, and the Supreme Court of Iowa has decided that in the absence of such a statute, a railway company may reserve in a contract of lease an exemption from liability for negligence, without violating the public policy of the state. Such a decision is as much a determination of what the law of Iowa is, as it would be if it were enacted in a positive statute. We may say of it, what Justice BREWER said of the decision of the Supreme Court of Michigan in *City of Detroit* v. *Osborne*, *supra*:

"The fact remains that the decision of that court, *undisturbed by legislative action*, is the law of that state."

It is conceded that the question whether a railroad company in Iowa, when it leases a portion of its right of way, may reserve an exemption from liability for negligence, is absolutely "undisturbed by legislative action," so that we have here this curious—not to say absurd—situation: The plaintiffs bring a suit founded entirely upon a supposed public policy of the state, and after the Supreme Court of the state has decided that plaintiffs were mistaken in their view of public policy, they insist that the decision does not settle what is the public policy of the state.

Griswold v. *Illinois Central Railroad Company*, 90 Iowa, 265, is the case which determines the public policy of the State of Iowa on this question. It was the case

which Judge Shiras followed, on the distinct ground that he was bound to recognize the right of the Supreme Court of the state to decide what is the public policy of the state. There is no room for discussion that the question involved in the Griswold case was precisely the question involved in this case. Justice GIVEN in announcing the decision of the Supreme Court of Iowa in the Griswold case stated it thus:

"It will be seen from the statement of the case that the controlling question is whether that clause of the lease whereby plaintiff Griswold agrees to protect and save harmless the defendant from all liability for damages by fire negligently communicated to the property on the leased premises in the operation of the railroad is void as against public policy."

The court held that it was not; and Judge Shiras did what all courts are bound to do—he left to the Supreme Court of the state the determination of what is the public policy of the state.

As we have shown above, every question that can arise as to the liability of railway companies for fires or for other consequences arising from negligence or mischance of any kind, are within the competency of the state to regulate by written statutes. The legislature of Iowa has adopted various statutes fixing liability for fires arising from the operation of railroads and the Supreme Court of that state in the Griswold case held that under none of them was the defendant company forbidden to protect itself from liability by the exemption in the lease, out of which this litigation arises.

THIS LEASE WAS VALID, UNDER THE STATUTE LAW, AND LOCAL POLICY OF IOWA, RELATING TO FIRES SET BY RAILWAYS.

Counsel for plaintiffs in error say that "statutes will be found everywhere holding railway companies to a stricter liability for setting out fires than that imposed by the common law rules of negligence. But no statutes can be found anywhere which attempt to exempt railway companies from liability for damages for fires negligently set out by their locomotives." From these premises they draw the deduction that "*the conclusion is irresistible of a general and universal public policy against permitting fires to be set out by railways, in the operation of their trains and against exempting railways from liability for such fires when set out by them.*"

It is unquestioned that the State of Iowa has a definite and settled *policy* in respect to liability for fires set in operation of railways within its borders, and that such policy is declared in its statutes and judicial decisions.

1 McClain's Ann. Code of Iowa, Sec. 1972, provides:

"That any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating of any such railway, etc."

In the Griswold case it was contended that an exemption in a railroad lease was obnoxious to this statute and opposed to the public policy of Iowa, but, in holding otherwise, the Supreme Court of that state, said:

"The former opinion holds correctly that the liability of railroad corporations, under section 1289 (1972), for negligently setting out fires, is absolute, and that the obligation on the part of the railroad companies to exercise care is towards the public; *but the question remains whether that section applies to cases like this, or, in other words, whether it established any interest in the public, or imposed any duty upon the defendant towards the public, in respect of the property of the plaintiff.* The de-

fendant owed no duty to the public to exercise care with respect to its own buildings situate on its right of way, and incurred no liability for their negligent burning, unless the fire spread beyond its own premises. The operation of a railway increases the danger from fire to the property of the people situated on their own premises, where they have the right to have it, and hence the provision in section 1289 making the corporation operating the railway absolutely liable for all damages by fire that is negligently set out or caused by the operation of the railway. As to such property the railway company owes to the public the duty of care, and the public has an interest in the performance of that duty. Therefore, a contract that exempts from that duty to the public would be injurious to the public interests, and against public policy. * * * This is not a question whether, under section 1289 (1972), the defendant would be liable to Griswold for negligently communicating fire to this property in the absence of a contract to the contrary, but it is whether the public has any interest that this contract contravenes. It seems to us now quite clear that as these buildings could only be placed upon the defendant's right of way by its consent, and were so placed upon the premises, and on the conditions expressed in the lease, the public had no interest therein, under said section 1289 or otherwise, that would be injured by giving effect to the agreement in question."

Griswold v. *Ill. Cent. R. R. Co.*, 90 Ia., p. 270.

See, also, the Iowa Code, Sec. 1308 (1 McClain's Ann. Code, Sec. 2007), which provides that:

"No contract, receipt, rule or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier of passengers, which would exist, had no contract, receipt, rule or regulation, been made or entered into."

As to this section, the court further said:

"It is contended that the defendant entered into this contract *in its capacity as a common carrier*, and there-

fore we must apply to the consideration of the question section 1308, providing, in effect, that carriers of persons or property cannot exempt themselves from liability by contract which would exist had no contract been made. It is undoubtedly true that the ultimate purpose of the defendant in entering into this contract was the promotion of its business as a common carrier. But the contract is not for the carriage of persons or property. That the ultimate purpose was to increase its business as a carrier does not make this a contract for carriage any more than would be the employment of workmen in its shops, warehouses or elsewhere apart from the operation of the road. Upon further consideration we are of the opinion that this contract was not made by the defendant in its capacity as a common carrier, and that the provision of section 1308 is not applicable." (p. 272.)

By the above quotations it will be seen that the Iowa court construed these sections of the local statute, and expressly held that they did not invalidate the provision or covenant in that lease which relieved the railroad company from liability for fires negligently set by employes in the operation of its road. It was decided that such a case was not within these statutes, or the policy of the law as declared therein. It is clear, therefore, that so far as the question rests upon statutory interpretation, this court is bound to follow that decision, upon the principle that local construction of state statutes is binding upon Federal courts. As said by SANBORN, J.:

"It constitutes an authoritative construction of the statutes of the states." (70 Fed. Reptr., 203.)

It can not be denied that the Supreme Court of Iowa held these statutes to be declaratory of the *public policy* of the state, in respect to the very question at issue in this case, and decided that such policy was not violated by the lease in question. This, in regard to a matter of local concern—the creation of a leasehold interest in or title to

real estate within its own borders. Under the law this lease created an interest in "real estate," and conveyed a title to "real property," within the purview of the Iowa statute.

"REAL PROPERTY. 8. The word 'land,' and the phrases 'real estate' and 'real property' include lands, tenements, hereditaments, *and all rights thereto and interests therein*, equitable as well as legal."

1 McClain's Ann. Code, p. 11, Sec. 49.

The lease, moreover, created and conveyed an interest in real property within the State of Iowa, *upon a certain condition precedent*. Such leasehold estate was to *vest only upon express condition* that the lessor be exempt from liability for damage caused by use of its adjoining premises. The validity of this condition directly concerned, and indeed controlled the very existence of the lease. If legal, the estate vested and there is no liability for loss by this fire. If illegal, no estate was created or title conveyed, and Simpson, McIntire & Co. occupied these premises without right or authority.

"As to conditions precedent strict performance is required, and if it becomes impossible from any cause, the estate cannot vest."

Wood's Landlord & Tenant, p. 435.

"A condition precedent is one to be performed before the leasehold estate can vest. But if the performance is impossible or *unlawful*, no estate will vest under the condition."

12 Am. & Eng. Ency. of Law, p. 1000.

Now, the highest judicial tribunal of the state wherein this land was situated, has determined that such *condition* of a lease is valid; that it is not repugnant to any statute or obnoxious to any policy of the State of Iowa.

The Griswold case constitutes a local rule for that state. It holds that leasehold title to real estate may be lawfully created and conveyed upon condition that the grantee assumes all risk of fire set by use of the adjoining premises. By affirming the legality of this condition, which is *precedent* to the vesting of the estate, it necessarily settles the validity of the title itself. Does not this opinion applied to the facts at bar, sustain all leasehold estates in Iowa land created upon like condition? Federal courts adopt the local law of real property, as ascertained by the decisions of state courts, whether founded on statute, or a part of the unwritten law of the state.

Jackson v. *Chew*, 12 Wheaton, 153.
Green v. *Neal's Lessee*, 6 Peters, 291.
Swift v. *Tyson*, 16 Peters, 18.
Suydam v. *Williamson*, 24 How., 427.
Beauregard v. *N. O.*, 18 How., 497.
Williams v. *Kirtland*, 13 Wall., 306.
R. R. Co. v. *Natl. Bank*, 102 U. S., 57.
Bondurant v. *Watson*, 103 U. S., 281.

In *Jackson* v. *Chew*, this court in 1827, followed decisions of the New York courts settling a rule of construction of devises of real estate, saying:

"This court adopts the state decisions, because they settle the law applicable to the case; *and the reasons assigned for this course apply as well to rules of construction growing out of the common law as the statute laws of the state, when applied to the title of lands.* And such a course is indispensable in order to preserve uniformity; otherwise the peculiar constitution of the judicial tribunals of the states and of the United States would be productive of the greatest mischief and confusion." (p. 167.)
"And whether these rules of land titles grow out of the statutes of a state or principles of the common law, adopted and applied to such titles can make no difference.

There is the same necessity and fitness in preserving uniformity of decisions in the one case as in the other." (p. 168.)

The same reason was also forcibly expressed in the later case of *Green* v. *Neal's Lessee's*, *supra*, where this court, reversing its former holding, followed a decision of the Tennessee court as to the construction of a state statute of limitations affecting title to real estate.

The court said:

"Here is a judicial conflict arising from two rules of property in the same state, and the consequences are not only deeply injurious to the citizens of the state, but calculated to engender the most lasting discontents. It is, therefore, essential to the interests of the country, and to the harmony of the judicial action of the Federal and state governments, that there should be but one rule of property in a state." (p. 300).

Suppose the defendant having executed the lease, had refused to give possession of the demised premises, and Simpson, McIntire & Co. had sued therefor, in the state court. If the company should defend upon the ground that the lease was void and conveyed no legal title to, or right of possession of the land, because made upon a condition contrary to public policy, would not the Iowa court, following the rule of the Griswold case, promptly give judgment awarding possession to the tenants? Would not such a decision establish *a local rule* for that state? Would this court, in a similar case, refuse to follow such rule and hold the lease invalid as against a supposed public policy, and thereby establish two different policies for, and create two conflicting rules of property in the same state?

But, granting that the Griswold case did not establish what is strictly termed a "rule of property," still it re-

mains that the question was largely, if not entirely, *local* in its nature, and in respect to which the State of Iowa had a settled policy of its own, which was declared in that suit. *In general, the public policy of a state means the local self-interest of that commonwealth.* What that shall be, must necessarily be determined by the state itself. No other state can decide for it; the United States cannot decide for it. For example, each state must judge for itself what its *policy* shall be towards corporations of another state. It may admit or exclude them, arbitrarily. It may receive them upon such terms as it sees fit to exact, and neither the state creating the corporation, nor the Federal government, can object or interfere. This doctrine has been carried so far that this court has refused to interfere with the action of the State of Wisconsin in revoking the license of a foreign insurance company, because it removed a suit against it, from the state into the Federal court, contrary to the laws of that state.

Doyle v. *Ins. Co.*, 94 U. S., 535.

This local self-interest or policy of a state may change from time to time, just as that of an individual. Different conditions may affect or control it. Of these, it must necessarily judge for itself, unhampered by the control of any other state, or of the United States. True, as we have already said, another sovereignty might decide more wisely what was for the best interests of Iowa, but, it alone, has the final power to determine what its own policy shall be; so, also, with the national government as to those interests confided exclusively to its charge. This public policy of a state is usually evidenced by its written laws. Statutes are declaratory of the policy of the state in a given matter; but, in the absence of legislative declaration, such policy is

ascertained and announced by its judicial decisions. Indeed, public policy is to be sought from decisions as well as statutes, because the policy of a state is the law of that commonwealth, whether enacted by statutes or expressed by courts. This doctrine has been recognized by Federal courts from an early time. They have uniformly declined to make or control a local policy for any state, but have contented themselves with ascertaining such policy from the statutes or decisions of the particular state, and then following it.

Bank of Augusta v. *Earle*, 13 Peters, 519.
Vidal v. *Girard's Executors*, 2 Howard, 127.
Teal v. *Walker*, 111 U. S., 242.
City of Detroit v. *Osborne*, 135 U. S., 492.

The foregoing considerations were stated by SHIRAS, J., at the circuit, as follows:

"The stipulations in the lease, so far as they affect this case, deal only with the duty and obligation resting upon the defendant company growing out of the fact that the company, in its business, uses the dangerous agency of fire. The right to use the agencies of fire and steam in the movement of railway trains in Iowa is derived from the legislation of the state, and it certainly cannot be denied that it is for the state to determine what safeguards must be used to prevent the escape of fire, and to define the extent of the liability for fires resulting from the operation of trains by means of steam locomotives. This is a matter within state control. The legislation of the state determines the width of the right of way used by the companies. The state may require the companies to keep the right of way free from combustible material. It may require the depot and other buildings used by the company to be of stone, brick or other material when built in cities or in close proximity to other buildings. The state, by legislation, may

establish the extent of the liability of railway companies for damages resulting from fires caused in the operation of the roads. When providing for the acquisition or condemnation of the right of way, the state may declare the public uses to which the right of way may be subjected. Can there be any doubt that the state may empower the railway companies to contract with third parties for the erection of warehouses or elevators on the right of way, to be used for the reception and storage of grain and other products, preparatory to shipment upon the railway, and that the state can define the extent of the liability of the railway companies for damages resulting to such property from fires caused by the operation of trains upon the railway? These considerations, and others of like import which might be suggested, clearly show that it is a matter within *state control* to determine the extent of the liability for injury by fire resulting from the operation of railway trains under charters or authority granted by the state. Therefore, when the question arises whether a given contract, intended to define or limit the liability of a railway company with respect to injury resulting from fires, is valid or not, it must be solved by ascertaining what is the statute law or public policy of the state wherein the fire may have occurred. In the case now before the court, if the contract contained in the lease does not violate any of the provisions of the Constitution of the State of Iowa, or is not contrary to any statute of the state, or is not contrary to the public policy of the state as otherwise declared, it cannot be held invalid. * * * The right of parties to contract freely and fairly cannot be denied upon the ground of an adverse public policy, unless it *clearly appears* that there is a recognized or established public policy touching the subject-matter which will be violated if the contract is enforced. The burden is upon the plaintiffs in the case of showing that the contract in question is contract to the public policy of the State of Iowa. No express provisions of the constitution or statutes of the state are cited as evidence of the public policy of the state, and the only final decision of the Supreme Court of the state upon the question holds that a contract such as is found in the lease to Simpson, McIntyre & Co., is not

contrary to the public policy of the state. Upon what theory can this court hold that the invalidity of the contract is established? Is this court justified in ignoring the decision of the Supreme Court of Iowa as evidence of the public policy of the state? Clearly not."

(Record, p. 22) 62 Fed. Rep., pp. 906-8.

We quote thus freely from Judge Shiras because of the great clearness and force of his reasoning upon this question. Practically he covers the entire ground, and we have only sought above to present the same line of argument with somewhat greater detail.

In this connection the following decisions of this court bear upon the question under discussion.

In *Bucher* v. *Cheshire R. R. Co.*, 125 U. S., 555, a statute of Massachusetts forbade traveling on Sunday except for necessity or charity, under penalty of a fine. Plaintiff was injured while riding upon the railway in violation of this statute. State cases had held that there could be no recovery for personal injuries received under such cirsumstances, and this court, MILLER, J., followed such decisions as establishing the local law of Massachusetts on that subject, although not agreeing with their reasoning or conclusion, saying:

"It is also well settled that where a course of decisions, whether founded upon statutes or not, have become rules of property, as laid down by the highest courts of the state, by which is meant those rules governing the descent, transfer or sale of property, and the rules which affect the title and possession thereto, they are to be treated as laws of that state by the Federal courts."

In *Etheredge* v. *Sperry*, 139 U. S., 266, this court also held that Iowa decisions holding chattel mortgages to be valid in that state, which expressly provided that the mortgagor should remain in possession and sell the mort-

gaged property in the usual course of trade, established a rule of property or local law, and would be followed by Federal courts. BREWER, J.:

"While chattel mortgages are instruments of general use, each state has a right to determine for itself under what circumstances they may be executed, the extent of the rights conferred thereby, and the conditions of their validity. They are instruments for the transfer of property, and the rules concerning the transfer of property are, primarily at least, a matter of state regulation. We are aware that there is a great diversity in the ruling on this question by the courts of the several states; but whatever may be our individual views as to what the law ought to be in respect thereto, there is so much of a local nature entering into chattel mortgages that this court will accept the settled law of each state as decisive in respect to any case arising therein."

See, also:

Chicago Bank v. *Kansas City Bank*, 136 U. S., 235.

Brown v. *Furniture Co.*, 7 Cir. Ct. App., 225.

Swann v. *Swann*, 21 Fed, Rep., 299.

Counsel for plaintiffs in error make some point of the fact that the first decision of the Supreme Court of Iowa in the Griswold case holding the exemption void, was made before the fire which destroyed the warehouse of Simpson, McIntire & Co. The dates are as follows:

1. The Simpson, McIntire lease with the defendant company was made February 1, 1890.

2. The Griswold fire occurred April 30, 1890.

3. The first Griswold decision was made by the Supreme Court of Iowa October 19, 1892, but was not officially published until after the Simpson, McIntire fire. A petition for rehearing was immediately filed, and

4. February 3, 1894, the final decision of the Supreme Court in the Griswold case was made, holding that the exemption in the contract was valid.

5. The fire which destroyed the Simpson, McIntire warehouse occurred November 11, 1892, while the motion for rehearing in the Griswold case was pending.

It will thus be seen that when the lease of Simpson, McIntire & Co. was executed in February, 1890, there had been no ruling or decision by the Supreme Court of Iowa on the question of the validity of the exemption of the lease. It cannot therefore be maintained that Simpson, McIntire & Co. were induced to execute the lease in reliance upon any decisions of the Court of Iowa that its conditions were invalid and void.

Opinion of Judge Shiras, Rec., p. 24.

As stated by Judge Shiras:

"The final decision in the Griswold case shows that on the 30th day of April, 1890, more than two years before the fire happened in this case, the public policy of the state was not adverse to the validity of the exemption from liabilities such as are contracted for in the lease of Simpson, McIntire & Co." Record p. 24.

It appears, therefore, that the final decision of the Supreme Court of Iowa in the Griswold case determines what is the public policy of the state, and what it was when the contract in this case was made. It is a singular instance of illogical reasoning for plaintiffs in error insist that the final decision of the Supreme Court of Iowa in the Griswold case is not binding upon the Federal courts, but that the first decision which was afterwards changed on rehearing, is binding. They say, on page 49 of their brief:

"At this time (November 11, 1892), the plaintiff in-

surance companies were authorized to rely upon the decision above stated, and to believe that if a fire occurred through the negligence of the railway company, it would be liable over to them for any insurance they were required to pay upon the warehouse and its contents, notwithstanding the provision in the lease attempting to exempt the railway company from liability for such fire."

But it cannot be possible that the first decision of the court, followed immediately by a petition for a rehearing, can establish rights or liabilities against the conclusion finally reached. The first decision does not appear in the official reports of the state of Iowa, but was published only in the Northwestern Reporter. But beyond all this, the insurance companies who are plaintiffs here do not for one moment claim or show that they ever did anything in reliance upon the first decision of the Supreme Court in the Griswold case, or that their position had in any sense been changed by reason of that decision.

See Equitable v. Pacific, 108 U. S., 143, and the discussion of this part of the case in the opinion of Judge Shiras, Rec., 24.

II.

Having shown that the question involved is purely one of the public policy of Iowa, and that the Supreme Court of that state has determined it, we might well submit the case without further argument. But counsel for plaintiffs in error attack the decision of the Supreme Court of Iowa and insist that it is bad law. The Circuit Court of Appeals declare that it is good law and follow it, not because it is binding upon Federal courts but because it is a sound and correct exposition of the doctrine of public

policy. The record contains two very able arguments leading to the same result. First, that of Judge Shiras, showing the binding authority of the decision rendered by the Supreme Court of Iowa, and secondly, that of Judge Sanborn, discussing the question as an original one.

We now draw the attention of the court to our second proposition, namely:

Even if the Supreme Court of Iowa had not passed upon the question, the Circuit Court of Appeals was clearly right in deciding, as a general proposition, that the exemption contained in the lease is not contrary to public policy and is, therefore, valid.

Before this lease was made the lessor and the lessees stood upon an equal footing. Neither owed any duty to the other in respect to the land demised by the lessee; certainly the lessees had no right to demand that a site for their building should be carved out of defendant's right of way. The lease established a certain relation between the parties; not the relation of a common carrier to its shippers, but the relation of landlord and tenant. The fact that the railway company owed a duty to the public in respect to other matters has not the slightest relevancy in a discussion of the relation which the parties bear to each other under this lease. The lessees did not come to the railway company demanding a right, but they came requesting a privilege. Without the permission of the railway company they could not enter upon the right of way, nor could they erect their warehouse or carry on the business for which it was erected.

Judge Sanborn, in the opinion of the Court of Appeals, pointed out with great clearness that the contract does not assume to relieve the railway company from any of its public duties, but the only effect of the stipulation

of exemption from liability for negligence is "to prevent the assumption by the railroad company of a new duty which it was entirely free to assume or to refuse to assume." (Rec., 43.)

We do not think the utmost industry of counsel will enable them to find a single case holding that such an exemption as was contained in the lease to Simpson, McIntire & Co., is invalid or in any sense contrary to public policy either in Iowa or elsewhere. The Supreme Court of California, only about a month before the Court of Appeals decided this case, had precisely the same question before them, and in a very strong opinion they held that such an exemption is valid, and demonstrated it by a course of reasoning which seems perfectly conclusive and unanswerable. It is the case of *Stephens et al.* v. *Southern Pacific Company*, 109 Cal., 84. We shall quote somewhat largely from the opinion, because it enforces, with great ability, the reasoning of Judge Sanborn in his opinion. In the California case, the plaintiff, Stephens, was the owner of a certain warehouse situated upon land adjoining the defendant's depot grounds in the Town of Hanford, California. Stephens held the land under a lease from the railway company, one of the covenants of which was as follows:

"And it is further agreed that the said party of the first part shall not be responsible for any damage caused by fire whether from railroad engines or from the buildings of the said party of the first part, or by fires caused from any other means, but the risk or damage, from whatever source, shall be alone sustained by the said party of the second part."

The warehouse was destroyed by fire alleged to have been negligently kindled by the railway company's employes upon adjoining land for the purpose of burning the dry

grass, rubbish, etc., thereon. Stephens was carrying insurance at the time of the fire, and the insurance companies paid the loss and joined with Stephens as plaintiffs. The suit was prosecuted as this suit has been, under the assumption that the exemption contained in the lease was against public policy, and therefore void.

We quote from the opinion of the court by GAROUTTE, J. He says:

"The trial court held the foregoing provision of the contract of lease void, as against public policy, and our attention shall be addressed to the consideration of that question, for, as we view the case, a solution of it is determinative of the litigation. The fact that the defendant is a common carrier has no place in the case. The rights of parties dealing with common carriers, and the duties of common carriers towards parties with whom they deal, and towards the public in general, are elements foreign to any question here involved. At that time it was not dealing with plaintiff Stephens as a common carrier, nor was Stephens contracting with it upon any such understanding or hypothesis. As far as this transaction was concerned, the parties when contracting, stood upon common ground, and dealt with each other as A and B might deal with each other with reference to any private business undertaking. It follows that all these principles of law denying or restricting the rights of common carriers to limit their legal liabilities for damages arising from injury to person or property stand upon a different plane, and are not controlling here.

Is this provision of the contract void as against public policy? That the principle of law involved is an original one, as applied to the present state of facts, is apparrant when we consider that but a single case has been found directly in point, although it is evident from the argument that counsel upon both sides have very industriously sought for precedents. This provision of the contract is declared by respondents to be opposed to public policy, in this: That it has a tendency to lessen the amount of care that defendant would exercise, both in the selection and operation of its machinery, and in the

general conduct of its business, though its employes, in respect to the control of fire, the element here involved. That the undoubted effect of a contract exempting a party from damages flowing from his negligent use of fire is to increase the chances of conflagration—that is, one who is protected by an agreement against the results of his carelessness in this respect will not take the same care as he otherwise would—and, therefore, carelessness occasioned and caused by the agreement, increasing the probabilities of conflagrations, injuriously operates upon the interests of the public at large.

The foregoing line of reasoning is ingenious, but we cannot indorse it as sound law. It has been well said that public policy is an unruly horse, astride of which you are carried into unknown and uncertain paths, and here that horse would be carrying us beyond all limits ever reached before, if respondents position should meet with our approval. While contracts opposed to morality or law should not be allowed to show themselves in courts of justice, yet public policy requires and encourages the making of contracts by competent parties upon all valid and lawful considerations, and courts, recognizing this, have allowed parties the widest latitude in this regard: and, unless it is entirely plain that a contract is violative of sound public policy, the court will never so declare. 'The power of the courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt.' *Richmond* v. *Ry. Co.*, 26 Iowa, 191: 'Before a court should determine a transaction which has been entered into in good faith, stipulating for nothing that is *malum in se*, to be void as contravening the policy of the statute, it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial, not theoretical or problematical.' *Kellogg* v. *Larkin*, 3 Pin., 125: 'No court ought to refuse its aid to enforce a contract on doubtful and uncertain grounds. The burden is on the defendant to show that its enforcement would be in violation of the settled public policy of this state, or injurious to the morals of its people.' *Swann* v. *Swann*, 21 Fed. Rep., 299."

Continuing the discussion of the questions involved in the case, Justice Garoutte took up the various arguments which had been made in behalf of the plaintiffs—the same that have been made here—and showed them to be utterly fallacious and unsound. The supposed tendency of such contracts to encourage negligence and to make people less careful in the conduct of their business, was shown to be somewhat imaginary, and in addition it was pointed out that a great variety of contracts which are universally admitted to be valid, have the same tendency. Such are all forms of insurance contracts, and policies of indemnity against loss for the negligence and dishonesty of employes which are now a very common form of contract, and by which railway companies, banks and mercantile companies protect themselves.

It does not appear in this record, and certainly it cannot be presumed, that the lease in question contemplated any relations whatever between the railway company as lessor, and Simpson, McIntyre & Co. as lessees, by which any of the public duties or obligations of a common carrier were to arise or be performed by this defendant. There is absolutely nothing in the record to warrant such a claim, and we cannot insist too strongly upon this fact. It constitutes a vital point upon which the case must turn. The mere fact that this railway company sustained a *quasi-public* relation as a common carrier of freight and passengers, did not preclude it from leasing portions of its right way, not needed for its public business, to private enterprises like warehouses, etc., upon such terms and conditions as might be mutually agreed upon between the parties. The sole right to acquire, hold and enjoy this right-of-way was derived from the authority of the State

of Iowa. It is unquestioned that the state could regulate the *use* to which such right-of-way might lawfully be devoted by the railway company. It could authorize or forbid the making of such a lease. It could impose the terms and restrictions under which it might be made. No statute of that state has forbidden this lease, and in the absence of legislative prohibition the Supreme Court of Iowa has held, in the Griswold case, that the lease was authorized by law and not opposed to the public policy of the state. This decision conclusively established the legal right of this company to make the Simpson-McIntyre lease, upon the terms and conditions therein agreed to.

A recent decision of this court is directly in point, and decisive of the underlying principle upon which this case rests. In *Missouri Pacific Railway Company* v. *State of Nebraska*, decided in 1896, and reported in 164 U. S., 403, it appeared that certain grain raisers and shippers applied to the railway company for permission to occupy a portion of its depot grounds at Elwood, Nebraska, for the purpose of erecting an elevator for the storage of grain by themselves and others. The company refused, and they appealed to the State Roard of Transportation for an order granting them that privilege. At the hearing it was found that the terminal facilities of the railway company at that station were inadequate, at certain seasons, to accommodate the public in the receipt and storing of grain for shipment; that the railway company had previously granted to two other parties the right to occupy portions of its depot grounds with private elevators, and had refused like privileges to petitioners. That board, acting under supposed authority of the statute, entered an order requiring the railway company to grant to petitioners the same elevator privileges that it had previously granted

to others. Upon the refusal to comply, the Supreme Court of Nebraska issued a writ of mandamus enforcing the order of the commission. The railway company appealed to this court, where it was held that the right of way was its *private property*, held for the public use; that it could not be compelled to lease portions thereof to others, and that to compel such occupancy against its will would amount to a taking of private property without due process of law. This court, speaking through Mr. Justice GRAY, said:

"A railroad corporation doubtless holds its station grounds, tracks and right of way *as its private property*, but for the public use for which it was incorporated; and may, in its discretion, permit them to be occupied by other parties with structures convenient for the receipt and delivery of freight upon its railroad, so long as a full and safe passage is left for the carriage of freight and passengers. *Grand Trunk Railroad* v. *Richardson*, 91 U. S., 454. But how far the railroad company can be *compelled* to do so, against its will, is a wholly different question. * * * The order in question was not limited to temporary use of tracks, nor to the conduct of the business of the railway company. But it required the railway company to grant to the petitioners the right to build and maintain a permanent structure upon its right of way" * * * "To require the railroad company to grant to the petitioners a location on its right of way, for the erection of an elevator for the specified purpose of storing from time to time the grain of the petitioners and of neighboring farmers, is to compel the railroad company, against its will, *to transfer an estate in part of the land which it owns and holds* under its charter as its private property and for a public use, to an association of private individuals, for the purpose of erecting and maintaining a building thereon for storing grain for their own benefit without reserving any control of the use of such land or of the building to be erected thereon, to the railroad company for the accommodation of its own business or for the convenience of the public.

"This court, confining itself to what is necessary for the decision of the case before it, *is unanimously of opinion* that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners for the purpose of building and maintaining their elevator upon it, *was in essence and effect a taking of private property of the railroad corporation for the private use of the petitioners.* The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is in violation of the fourteenth article of amendment of the Constitution of the United States."

Mo. Pac. Ry. v. *Nebraska*, 164 U. S., pp., 414-417.

This decision establishes a sure foundation upon which our argument may safely rest, and it is directly opposed to the contention of plaintiffs in error. Counsel seem to have overlooked the case. In this Nebraska suit it could have been urged with far greater force than in the case at bar (and undoubtedly was urged), that the furnishing of elevators for storage of grain preparatory to shipment, was an essential and necessary part of adequate station facilities by the railway company; that grain cannot be, and, ordinarily, is not received for carriage at freight depots, but necessarily requires elevators into which it can be delivered by shippers, and from which it can be conveniently loaded upon cars for shipment; that the station facilities afforded by the railway company, through itself or others, were confessedly inadequate to meet the requirements at that station; that as the company held itself out to the public as a common carrier of grains, it was an essential part of its duty to furnish such elevators or permit others to do so, upon its grounds; and that it could not refuse without neglecting an obligation imposed upon it by

public law and policy. It could have beeen further argued, with much greater weight than in the case at bar (and undoubtedly was argued), that petitioners desired such facilities as intending shippers of grain, and were invoking a public duty toward them as such shippers, yet this court evidently did not regard the contention as well founded and did not refer to it, as modifying in the least the respective duties and obligations of the parties. Every argument advanced by counsel for plaintiffs in error, here, could have been urged by the petitioners and the state, in that case, with much more plausibility. The opinion in the Nebraska case completely answers the reasoning of plaintiff's brief in the present appeal. Perhaps that is why they so studiously ignore it.

The Simpson, McIntyre Company lease did not concern or affect any public duties which this railway company, in its other and separate capacity as common carrier might be subject to, under the law of the land. It must be conclusively presumed that the company possessed adequate and ample station facilities at Monticello, Iowa, for the proper storage and handling of all products delivered or tendered to it for transportation over its railway, or waiting delivery after carriage. So far as this record discloses, it was both able and willing to perform, in a prompt and efficient manner, every duty which it owed to the public at large, or to any individual member thereof, in respect to station facilities as a common carrier of butter and eggs. There can be no pretense that this service was inadequate or these accommodations insufficient, in this respect. Simpson, McIntire & Co. made no complaint. The record does not show that they ever shipped, received, or offered to ship or receive, any

of this butter, or these eggs, over the defendant's line of railway, or that they ever contemplated such shipments in the future. It does show, however, that as dealers in those products they rented vacant ground of the company, adjoining its tracks, "*for the purpose of erecting and maintaining thereon a cold storage warehouse.*" Their business was that of purchasing butter and eggs, and storing them until such time as they should desire to ship or sell. How long that would be they alone knew.

They might retail to country dealers or sell at wholesale. In either event they might or might not desire to ship over this railway. It is possibly true that the lessor expected, and these lessees contemplated future shipments from this warehouse, when the winter season or higher markets should make it profitable to ship to distant markets; and probably the expected benefits arising from carriage of such products at some future time, may have been one of the inducing business motives to this railway company to make this lease at a merely nominal rental; just as railway companies, everywhere, encourage business enterprises near their lines, with a view to expected benefits by increase of shipments; but this contract itself concerned no public duty of the railway company, and its conditions violated no existing obligations of a common carrier.

These considerations were clearly and ably set forth in the learned opinion of Judge Shiras at the Circuit, and of Judge Sanborn in the Court of Appeals. They carefully pointed out the fact that none of these products had been delivered to the railway company, or were waiting carriage, or were in its control as a public carrier. In view of the plain record in this respect, unquestioned and unquestionable, we are utterly at a loss to understand

why counsel for plaintiffs in error persist in mistating the undisputed facts in the record and the real question at issue. Their whole argument rests upon an unwarranted assumption of fact. The premises failing, their conclusion is unsound.

They also cite and rely strongly upon the decision of this court in *Covington Stock Yards* v. *Keith*, 139 U. S., 128. The doctrine of that case is not questioned by us, but its applicability is squarely denied. It holds, in substance, that suitable and sufficient station facilities, such as freight depots, stock yards, etc., are necessary to a proper and efficient performance of the public duties of a common carrier in the receipt, carriage, and delivery of freight; that such facilities must be adapted to the peculiar character of the freight offered and received for shipment; and that a railway company may not neglect to provide such accomodations for itself, and exact a special charge therefor if furnished by others. There can be no serious question that this rule would apply with full force to this defendant company, in the conduct of its business *as a common carrier*, but in the case at bar it did not act or contract in any such relation. It owed no such duty to Simpson, McIntire & Co. They claimed no public right from the company, but dealt with it confessedly upon the assumption that they were seeking special privileges as lessees not open to the general public. The fallacy of counsel's whole argument on this point, lies in the fact that it fails, or refuses to distinguish between the public duties and the private rights of a railway company. These are distinct, and cannot be confused in this case.

Counsel for plaintiffs in error strenuously contend that all contracts which seek to relieve one party from legal

liability for its own negligence or that of its servants, are contrary to public policy and void. But this proposition is entirely too broad. There are many decisions of eminent courts holding that such exemptions are not unlawful, but may be contracted for in a proper case. The express messenger cases are striking examples of this class of decisions.

In two leading Massachusetts cases it appeared that express messengers, holding season tickets over the railroad and desiring to ride in the baggage cars, for their own business purposes, expressly contracted to assume all risk of injury while there, and to hold the railway company harmless therefrom. The trains were derailed through negligence and the messengers received injuries thereby. In the first case, it appeared that plaintiff's presence in the baggage car directly contributed to his injuries, and in the latter case it did not. In each of these suits it was held that the contract for immunity was valid and would be enforced. The court said:

"It is difficult to see upon what ground it can be contended that an agreement of the plaintiff, that in consideratton that the defendant would permit him to ride in the baggage car he would assume all risk of injuries resulting therefrom, is unreasonable or illegal. The defendant was under no obligation to give the permission, and the effect of the plaintiff's agreement was only that the liability of the defendant should not be increased by the permission that the plaintiff, if he should be injured in consequence of being in the baggage car, should not be entitled to recover damages of the defendant on the ground that he was there by its permission. The contract did not diminish the liability of the defendant. It left the risk assumed by the plaintiff in riding in the baggage car what it would have been without the contract; it only secured him against being ejected from the car. The question of the right of carriers to limit their liability for negligence in the discharge of their duty as car-

riers by contracts with their customers or passengers in regard to such duties does not arise under this contract as construed in this case."

Bates v. *Old Col. R. R. Co.*, 147 Mass., pp. 265–6.

In the second case it was said:

"The contract gave the plaintiff a privilege which he sought for his own convenience. That it was a valid contract cannot be questioned since the decision in *Bates* v. *Old Colony Railroad.*"

Hosmer v. *Old Col. R. R. Co.*, 156 Mass., 507.

The same conclusion was reached by the Supreme Court of Indiana in 1896, in an elaborate opinion reviewing the authorities. The case was similar, in all material facts, to the Massachusetts cases. The court affirmed the doctrine that a railway company cannot, by special contract, exempt itself from liability for the results of its negligence, or that of its servants, *while performing a duty which it owes to the public as a common carrier*, but held that it was not a duty of the railroad company, as common carrier, to transport the goods of an express company and the messengers in charge of them, and that where it undertakes by special engagement to do so, it thereby becomes a private carrier, or bailee for hire, as to the person or things so carried, and may lawfully protect itself by contract from the results of its own negligence in respect thereto.

L., N. A. & C. Ry. Co. v. *Keefer*, (Ind.) 44 N. E. Rep., 796.

The principle upon which these decisions rest, has found recognition by this court in the Express Cases, 117

U. S., 1. Certain railroad companies had undertaken to perform for the public the express business previously done over their lines by independent express companies. The latter applied for space in the express cars for their goods and messengers, but the railroad companies refused to grant such accommodations or to carry the messengers, and suit was brought to compel them to furnish the desired facilities. This court, however, held that railways were under no legal obligation to carry the goods and messengers of express companies, in the manner in which that traffic was usually handled; that in rendering such service, the railway would not be performing any duty which it owed to the public *as a common carrier*; and that the desired privileges could only be obtained by express contract between the parties, upon such terms as might be agreed upon.

The doctrine is further illustrated by what is commonly known as the "circus-train cases." In 1892 the present defendant company entered into a special contract to haul a circus train over its road, between certain points, on different days, and at rates below its regular tariff for carriage of passengers and freight. In consideration of the reduced rate and increased risk, it was expressly stipulated that the railway company should not be liable for injury, "from any cause," to the persons or property transported under such contract. A train was derailed, and part of the circus property destroyed through negligence of the railway company in respect to the condition of its track and the operation of its train. In an action to recover for such loss, the Circuit Court of Appeals for the Seventh circuit, held that the contract was valid and enforcible, basing their decision upon the broad ground that the railway company was under no legal obligation

to transport circus trains in the manner stipulated for, but that it contracted as a private and not as a public carrier in that respect, and therefore could lawfully secure indemnity against the results of its own negligence in respect to the subject-matter of the agreement.

C., M. & St. P. Ry. Co. v. *Wallace*, 14 Cir. Ct. App. Rep., 257; s. c., 66 Fed. Rep., 506.

This decision is directly sustained by the following authorities, which reach the same conclusion from similar states of fact.

Coup v. *Ry. Co.*, 56 Mich., 111.

Robertson v. *Ry. Co.*, 156 Mass., 525.

Forepaugh v. *Ry. Co.*, 128 Pa. St., 217.

Piedmont Mfg. Co. v. *R. R. Co.*, 19 S. Car., 353.

"A common carrier may undoubtedly become a private carrier, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry."

Bradley, J., *in R. R. Co.* v. *Lockwood*, 17 Wall., p. 377.

Liverpool Co. v. *Ins. Co.*, 129 U. S., 440.

Hutchinson on Carriers, 2nd Ed., Secs. 44 & 73.

"The private carrier may by contract with his employer, exonerate himself from liability on account of his inattention or want of diligence or skill in the execution of the trust. *He may stipulate that he shall in no event be liable, except for fraud or its equivalent.*"

Hutchinson on Carriers, 2nd Ed., Sec. 40,

Wells v. *Steam Nav. Co.*, 2 Comstock, 204.

Alexander v. *Green*, 3 Hill., 9.

The underlying principle of all these cases is that common carriers become private carriers when, by special contract, they undertake to transport property which it is not their regular business to carry; or to transport it in a different manner or by other methods from the usual and established ones. As public carriers, obliged to serve all equally within the range of their employment, railway companies are forbidden by the common law to exact unreasonable or oppressive terms and immunities, but the private carrier or bailee for hire is free to impose what condition he will. If agreed to, it is a mere matter of private contract in which the public are not concerned and in which no public policy is violated.

Now, if a railway company can refuse to furnish facilities and transport messengers for independent express companies, and can lawfully contract as a private and not as a public carrier to transport express messengers or circus trains, upon what legal basis or sound reasoning can it be successfully contended that the same company cannot, as a private owner, lease portions of its own right of way to a private partnership for business use, upon like terms of immunity and exemption from the results of negligence on the part of servants whose conduct it cannot always supervise or control. Does the railway company contract in the latter case, in its capacity as a public or common carrier, any more than it did in the express-messenger and circus-train cases? Have the public any greater interest in the latter contract than in the former agreements? Is the public policy of the state, or of the nation, violated in the latter case and not in the former? We submit that the doctrine of the foregoing decisions is decisive of the rule for which we contend. It is impossible to deny the validity of the exemption pleaded in this case, without overruling the decision of this court in the

express cases, and overturning the doctrine of the Massachusetts, Michigan, Pennsylvania, South Carolina and other courts upon the same question.

Another striking illustration of the doctrine is found in ordinary contracts of insurance. For example, take the very policies issued by plaintiffs in error upon this warehouse and contents: Although not expressly so worded, yet it is settled law that they actually indemnified and insured Simpson, McIntire & Co., against loss or damage to their property, occuring through any negligence of the owners themselves, or of their servants or agents. In these policies, the insurance companies went still further and voluntarily contracted with Simpson, McIntire & Co. to assume and carry the very same risk of loss by fire negligently set in the operation of defendant's railway which that firm had previously agreed, in their lease with the railway company, to assume and carry for themselves. In other words, plaintiffs in error insured Simpson, McIntire & Co. against the very risk that such lessees had previously indemnified their lessor against. In effect, *a re-insurance.*

This court has repeatedly held that insurance contracts were not unlawful or opposed to public policy, which directly indemnified common carriers against loss by fire occurring through their own negligence or that of their servants, to property in their possession as public carriers for transportation. It was said:

"No rule of law, or of public policy, is violated by allowing a common carrier, like any other person having either the general property or the peculiar interest in the goods, to have them insured against the usual perils, and to recover for any loss in such perils, *though occasioned by the negligence of his own servant.*"

GRAY, J., in *Phoenix Ins. Co.* v. *Erie Trans. Co.*, 117 U. S., 324.

In that case it was further said that:

"As the carrier might lawfully himself obtain insurance against the loss of the goods by the usual perils, though occasioned by his own negligence, he may lawfully stipulate that the owner be allowed the benefit of insurance voluntarily obtained by the latter." (p. 325.)

And in a later case, when asked to review the holding above quoted, this court said:

"Nor are we disposed to review our decision that common carriers can insure themselves against loss proceeding from the negligence of their own servants. The doctrine announced in the case cited (*Phoenix Ins. Co.* v. *Erie Trans. Co.*, 117 U. S., 312), has been referred to with approval in the subsequent cases of *Orient Ins. Co.* v. *Adams*, 123 U. S., 67, 72, and *Liverpool Steam Co.* v. *Phoenix Ins. Co.*, 129 U. S., 397,438."

Cal. Ins. Co. v. *Union Compress Co.*, 133 U. S., p. 415.

Where an insurable interest in property exists, insurance against loss by negligence of the owner or his servants is valid and will be sustained by the courts.

Ins. Co. v. *Coulter*, 3 Peters, 222.
Ins. Co. v. *Lawrence*, 10 Peters, 507.
Walters v. *Ins. Co.*, 11 Peters, 213.
Ins. Co. v. *Ins. Co.*, 5 Ch. Div., 584.
Shaw v. *Roberts*, 6 A. & E., 80.
Johnson v. *Ins. Co.*, 4 Allen, 388.

In *Shaw* v. *Roberts*, 6 Ad. & El., 80 (33 E. C. L. R.), Lord DENMAN said:

"There is no doubt that one of the objects of insurance against fire is to guard against the negligence of servants and others, and, therefore, the simple fact of negligence has never been held to constitute a defense. But it is argued that there is a distinction between the negligence of servants or strangers and that of the

assured himself. We do not see any ground for such a distinction."

The same is true of all contracts or policies of life, accident and indemnity insurance. They rest upon the same basis, and are controlled by the same principles. Negligence of the assured, or of the beneficiary, will not defeat recovery.

It could be argued with much greater force than in the case at bar, that these contracts of insurance would necessarily tend to diminish the care of the owner in respect to the property insured, and also the property of the public which might be indirectly affected thereby. The same argument would also apply to the express cases and circustrain cases cited above, yet it is evident that this argument has never been held to constitute a sufficient objection to such contracts, to require them to be held illegal and void as opposed to public policy. All these agreements, and many others which might be mentioned, would be invalidated if the contention of plaintiffs in this case is sound law, but upon the contrary, such contracts have been everywhere upheld by courts as being consistent with sound public policy. This has been pointed out with great force and clearness by the Supreme Court of California in *Stephens* v. *So. Pac. Co.*, *supra*. That decision is directly in point. It is not correct to say that the necessary effect of these contracts is to lessen the care which either party owes to the general public. The parties have simply agreed among themselves that their obligations *towards each other* shall be regulated by mutual contract, leaving the respective duties and obligations of each to the general public, as they were before. The contracting parties have separated themselves from the general public, and have entered into

new and different duties and obligations among themselves, but have not sought to diminish or destroy any right of the general public or to impair any obligation upon their part to that public. The same reasoning will apply with still greater force to the contract of lease between the parties to this suit. The duty of this railway company towards the general public, and each member thereof, in respect to the prevention of fires set by its negligence or that of its employes, remain precisely the same that it was before this contract was entered into. The measure of care and the incentive to exercise that care, were just as great, *after*, as before the execution of this lease.

In support of their contention that this lease was contrary to public policy and void, counsel for plaintiffs in error strongly rely upon that line of decisions, of which *R. R. Co.* v. *Lockwood*, 17 Wall., 357, and like cases are leading examples, and where this court lay down the rule that common carriers cannot lawfully stipulate with shippers for exemption from the consequences of their own negligence. This court refused to follow decisions of the State of New York upholding such agreements, and the doctrine has since been applied to other contracts of public carriers, both as to passengers and freight. These cases rest upon considerations peculiar to themselves. The stipulations were there made (or exacted) by public carriers *acting in that capacity, and in respect of duties and obligations which they admittedly owed to the public, and in which the state had a direct interest.* It was said that:

"The proposition to allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his

employment, would never have been entertained by the sages of the law."

R. R. Co. v. *Lockwood*, 17 Wall., p. 381.

But even in that case, the court say: "*If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment, then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public.*" (p. 379.)

It is to be observed that in the later case of *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S., 397, Mr. Justice GRAY, in analyzing and restating the doctrine of the Lockwood opinion, expressly puts it upon *common law principles.* He says:

"By the common law of England and America before the Declaration of Independence, recognized by the weight of English authority for half a century afterwards, and upheld by decisions of the highest courts of many states of the Union, common carriers could not stipulate for immunity for their own or their servant's negligence." (p. 439.)

This class of cases is not only not in conflict with our position, but sustains it, because the facts are vitally different. The lease and exemption in question were not *exacted* by defendant, or obtained in its capacity *as a common carrier, or in respect of duties obligatory under such relation*, out of an unwilling but helpless patron. They were voluntary transactions between parties acting in the private and independent situation of lessor and lessee, and concerning terms and conditions upon which a leasehold interest in or right to real estate should be created and enjoyed. Simp-

son, McIntire & Co. had absolutely no right whatever to occupy this land without the company's consent. Such consent might be given upon terms which they were free to accept or reject. If voluntarily agreed to, wherein were the general public concerned, or how did the railway company evade its public duties as a common carrier?

It is conceded that *if* such had been its effect, the statute of Iowa (1 McClain's Code, Sec. 2007), would have avoided the lease. But the Supreme Court of that state, in the Griswold case, held that it did not. If this decision is not a construction of state statute which this court should follow, is not its reasoning persuasive and convincing upon the question, considered as one of general law?

The public have a direct interest in the careful performance of these duties which essentially and necessarily inhere in the relation of common or public carrier, and it may well be said to be against public policy to uphold contracts which, in effect, allow the carrier to abdicate or ignore imperative public duties. In this respect the United States have a policy independent of that of each state. The power to regulate interstate commerce (carriage of persons and property) creates and requires a *national policy* in these respects, which should not be controlled by local and frequently conflicting policies or interests of the several states. These, and other considerations, sustain the doctrine of the Lockwood case, and similar decisions, without affecting in the least the rule for which we contend.

In *Hart* v. *Ry. Co.*, 112 U. S., 331, it was held not to be contrary to public policy for a common carrier of goods to stipulate for an agreed lower valuation in the event of loss by its own negligence. This court did not

think that such partial exemption, if fair and reasonable, would tend to lessen the care of the railway company in respect to goods entrusted to it for transportation.

Again: The class of cases which hold that it is contrary to public policy for an employer to exact from the employe, as a condition of employment, release of liability for personal injuries thereafter sustained by negligence of the master or his servants (of which *R. R. Co.* v. *Spangler*, 44 Ohio St., 441, is an example), rests upon peculiar and entirely different considerations. In the first place, it is well said that the state has a direct interest in the lives of its citizens. The welfare and prosperity of the public are concerned in the preservation of the lives and limbs of its members. A mutilated man is a burden, and a dead man a loss to society. The life and service of each individual are of value to the state. Intentionally or negligently to deprive it of either, is forbidden by positive law and public policy. Another reason is found in the *disparity* between the contracting parties. They do not stand upon the same footing or contract with equal freedom. The working man must labor, the capitalist is not compelled to hire. Such contest is unequal, and the weaker party is practically forced to barter away rights in which the public are interested. It was this very thought of inequality and subjection which largely influenced this court in the Lockwood and similar decisions, when it was said:

"*The carrier and his customer do not stand upon a footing of equality. The individual customer has no real freedom of choice, etc.*"

Gray, J., in *Liverpool Steam Co.* v. *Ins. Co.*, 129 U. S., 441.

Bradley, J., in *R. R. Co.* v. *Lockwood*, 17 Wall., 379.

But these forceful reasons have no application to contracts of indemnity against negligence, where mere *property* unaffected by public interest is concerned; where the parties stand upon a perfect equality, and where one seeks the use of another's land for business purposes. We submit that no well considered case invalidates a contract like the one at bar.

But counsel for plaintiffs in error further contend that aside from its obligations as a common carrier, this railway company owed to the public, and to Simpson, McIntire & Co., in particular, a separate and additional duty of ordinary care not to destroy their property by fires negligently set in the operation of its road, which duty it could not abdicate or evade by any contract. In this inquiry it is of the utmost importance clearly to ascertain the actual situation of the parties to this lease, and the respective duties and obligations of each, before as well as after making this lease.

We concede that the railway company could not, under guise of this contract, relieve itself from any obligations which positive law or public policy imposed for the general welfare, but we assert that these public duties were not affected, or intended to be changed by the lease in question. They remained precisely the same after this contract as before. To those who occupy land adjoining their right of way, or who do business upon adjacent premises, railway companies owe a duty of ordinary watchfulness and care to prevent loss or damage by the escape of fire in the operation of its trains. Each party being in the independent exercise of a legal right, not derived from the other, both must use reasonable care to avoid injury to the other. This upon the familiar principle that one must so use his own as not negligently

to injure the property of another. But if the same parties come themselves, or store their property upon the private right of way of the railway company, without its permission, they thereby become *trespassers in law*, and the railway company is not, thereby, charged with any active duty of care for the protection of such persons or property, but are liable only for willful or wanton injury, or negligence so gross as to evince wantonness or willfulness. Numerous decisions of courts, state and Federal, have settled this rule of law which is equally applicable to persons or property.

Before the execution of this lease, Simpson, McIntire & Co. had no legal rights whatever upon defendant's station grounds. They could not place their buildings or store their property thereon without being trespassers, and incurring all the risks resulting from such trespass. Being there as trespassers or as mere licensees, no active duty of watchfulness and care towards them or their property would be imposed upon the railway company in the operation of its engines and trains, but only a mere negative obligation of abstaining from willful or wanton injury. They could not compel the railway company, against its will, to lease to them any part of its right of way or to permit them to erect buildings or store property thereon.

Mo. Pac. Ry. Co. v. *Nebraska*, 164 U. S., 403.

For their own private benefit and advantage, Simpson, McIntire & Co. sought to secure privileges which the law did not give them, and which they could acquire only by express consent of, and special contract with, the owner of the land. They, therefore, applied for a lease of

ground upon which to erect and maintain a cold storage warehouse, in close proximity to railway tracks in constant use, wherein were to be stored butter, eggs and other perishable products. If such permission should be granted, without restriction, a new, continuing and possibly onerous obligation would thereby be imposed upon the railway company, namely, the duty of exercising reasonable watchfulness and care to prevent the burning of this building and contents by fire set through negligence of its servants conducting its business, but whose conduct it could not always supervise or control. This new duty did not concern defendant's ordinary business as a common carrier, nor was it a burden which it held itself out to the general public that it would undertake for all who desired to locate upon its right of way. Upon the contrary, it was a duty created and existing wholly by mutual agreement, and therefore to be measured by the terms of the contract itself.

The railway company, therefore, announced, in effect, that it would not consent to assume or carry this additional, and onerous risk, not obligatory upon or beneficial to it, but as a matter of favor would grant the desired privileges at a merely nominal rent, *provided and upon the express condition only*, that the lessees should assume and carry such risk themselves, and relieve the railway company therefrom. This proposition was voluntarily accepted by Simpson, McIntire & Co. They acquired the desired rights upon the condition of imposing no additional obligation of duty upon the lessor. Both parties stood upon an equal footing, and understood and mutually agreed upon such terms, by executing the lease in question. The lessees occupied under it for the full term and longer, and having received the benefits,

now refuse to repudiate the burdens of this agreement. They *disclaim of record* any right to recover for the balance of their loss beyond the insurance received, but the insurance companies who were paid to assume this very risk come into court and attack the contract under which the insured building was erected.

Freedom of Contract. The right of people to judge for themselves what contracts they shall make, provided they are not clearly immoral or detrimental to the public interest, is universally recognized by the courts; and political writers have shown how important it is to the well-being of a nation or a community that every citizen should be at liberty to work out his own destiny and to enter into such contractual relations as to him shall seem best, subject only to the limitation that his acts must not be subversive of the public welfare. The power of courts to declare what is the public policy and to declare that a contract is void as against public policy, is one of great responsibility and great delicacy. Courts do not strike down contracts which have been freely entered into except for the most cogent reasons. It is like the power to declare statutes unconstitutional, a power which is never exercised in doubtful cases.

In *Printing & Num. Reg. Co.* v. *Sampson*, The Law Reports, 19 Equity, 465, Sir George Jessel, Master of the Rolls, used this pregnant language:

"It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into fairly and voluntarily, shall be held sacred, and shall be enforced by courts of justice.

Therefore, you have this paramount public policy to consider, that you are not likely to interfere with this freedom of contract."

The Supreme Court of Iowa in *Griswold* v. *Illinois Central R. R. Co.*, *supra*, the case upon which Judge Shiras relied, adopts and approves the above language of Sir George Jessel, and the same court in *Richmond* v. *Railroad Company*, 26 Iowa, 202, said:

"The power of courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt."

In the California case which we have cited, *Stephens* v. *Southern Pacific Co.*, *supra*, that court said:

"While contracts opposed to morality or law should not be allowed to show themselves in courts of jurtice, yet public policy requires and encourages the making of contracts by competent parties upon all valid and lawful considerations, and courts, recognizing this, have allowed parties the widest latitude in this regard, and unless it is entirely plain the contract is violative of sound public policy, the court wsll never so declare."

In *Swann* v. *Swann*, 21 Fed. Rep., 299, Judge CALDWELL declared the law as follows:

"The contract in suit was voluntarily entered into, between parties capable of contracting, for a lawful and valuable consideration. It had relation to a subject-matter about which it was lawful to contract, and was a valid contract when and where it was made. No court ought to refuse its aid to enforce such a contract on doubtful and uncertain grounds. The burden is on the defendant to show that its enforcement would be in violation of the settled public policy of this state, or injurious to the morals of its people."

Here we have a contract made in Iowa, with all of its terms and provisions to be executed in Iowa, a contract

which has been attacked on the ground that it is violative of the public policy of Iowa. The Supreme Court of that state, after a full and elaborate discussion of every question, and after argument of a motion for a re-hearing, held the contract to be valid. Now, if the decision of the Supreme Court of Iowa upon this question is not controlling and binding upon the Federal courts it is, to say the least, in the language of Judge SANBORN, "entitled to the weight of persuasive authority." If this court is bound by the perfectly well-established doctrine that it will not refuse its aid in the enforcement of contracts unless their illegality is clearly shown, can it for a moment be urged that the contract in question is so clearly against public policy as to be free from doubt? If this court is not bound by the decision of the Supreme Court of Iowa, can it be said that that court, by its solemn decision of what is the public policy of that state, has not succeeded in raising a doubt or hesitation in the judicial mind of the Federal courts upon the question? Instead of that being the present situation, we have here to-day:

First. The decision of the Supreme Court of Iowa on the public policy of that state.

Second. The decision of Judge Shiras holding that that decision is binding upon Federal Courts.

Third. The decision of the Circuit Court of Appeals, by Sanborn J., holding that while the decision of the Supreme Court of Iowa is not binding upon them, that the decision was right and that the exemption from liability in the lease was clearly not against public policy, and

Fourth. The dissenting opinion of Judge CALDWELL, holding that the decision of the Supreme Court of Iowa is binding upon the Federal courts, but adding significantly:

"But, however this may be, *there is no difference of opinion between the Supreme Court of Iowa and this court as to the validity of the lease and all its conditions*, and there is, therefore, no occasion for this court to express an opinion upon the question whether it would be bound by the Supreme Court, *if the two courts differed on the question of public policy.*"

In other words the courts which have had the question before them are unanimous that the contract is a valid one, and not against public policy.

Besides all these adjudications, the Supreme Court of California, in *Stephens* v. *So. Pac. Co.*, *supra*, has, by an independent course of reasoning, reached the same conclusion, and has declared that an exemption from liability for negligence in a lease by a railroad company of lands for warehouse purposes, is not contrary to public policy.

Against all this overwhelming weight of authority and judicial reasoning, not a single case has been decided the other way.

In conclusion, we have only to say that these insurance companies solicited and took the risk upon this warehouse and contents, at a rate based upon the added exposure to fires from passing trains, and now seek to reap where they have not sown, by invoking a supposed public policy to recover for the loss which they received full consideration for assuming. We submit that the claim does not strongly appeal to an enlightened public policy, and that the Circuit Court of Appeals was right in so declaring.

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